Supreme Court, U.S.
FILED
No. 09-081526 FEB 17 2009
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

DARIN L. HAUMAN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition For Writ of Certiorari To The

Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

STEPHEN D. KULLA
9 East Main Street
Waynesboro, PA 17268
(717) 762-3374
Attorney for Petitioner

QUESTION PRESENTED

Whether evidence obtained by a warrant calling for the seizure of evidence from "any and all fruit of this or any other crime" should be suppressed and Mr. Hauman's conviction reversed when such language is unconstitutionally over-broad and consists of the "greater part of the warrant".

No. 09-

IN THE
SUPREME COURT OF THE UNITED STATES

DARIN L. HAUMAN,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition For Writ of Certiorari To The Pennsylvania Supreme Court

Petitioner Darin Hauman respectfully prays that a Writ of Certiorari issue to review the decision of the Superior Court of Pennsylvania entered on November 18, 2008.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS. 1

STATEMENT OF THE CASE 1-4

REASONS FOR GRANTING THE WRIT 4-9

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PURPOSE OF THE FOURTH AMENDMENT WAS THWARTED BY MR. HAUMAN'S WARRANT WHICH PERMITTED THE PENNSYLVANIA POLICE TO SEARCH MR. HAUMAN'S HOME WITH UNBRIDLED DISCRETION FOR EVIDENCE OF "ANY AND ALL CRIMES" AND BECAUSE THE SUPREME COURT SHOULD RESOLVE THE AMBIGUITY REGARDING THE MEANING OF THE "GREATER PART OF THE WARRANT" TEST 4

A. Introduction 4, 5

B. Mr. Hauman's Warrant Was Unconstitutionally Overbroad Because it Failed the Particularity Requirement of the Fourth Amendment 5, 6

C. Mr. Hauman's Motion to Suppress Should have been Granted by the Trial Court Because the Pennsylvania Police Could not have Reasonably Relied on its Language and Because the Invalid Portion of the Warrant is not Severable. 6-8

D. Certiorari Should Also be Granted to Resolve Ambiguity Among the Federal Circuits Regarding the Means of Determining when Severance is Appropriate 8-9

CONCLUSION 9

APPENDIXES 10-30

TABLE OF AUTHORITIES

CASES

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 7

Illinois v. Gates,
462 U.S. 213 (1983) 8

Massachusetts v. Sheppard,
468 U.S. 981 (1984) 5, 6

United States v. Clark,
31 F.3d 831 (9th Cir. 1994) 6, 7, 8

United States v. Gomez-Soto,
723 F.2d 649 (9th Cir. 1984) 9

United States v. Leon,
468 U.S. 897 (1984) 5, 6

United States v. Morris,
977 F.2d 677 (1st Cir. 1992) 6

United States v. Naugle,
997 F.3d 819 (10th Cir. 1993) 7

United States v. Sells,
463 F.3d 1148 (10th Cir. 2006) 7, 8, 9

STATUTES

Fourth Amendment 1

OPINIONS BELOW

The Superior Court of Pennsylvania issued its non-precedential decision of this case on September 1, 2006. A copy of that decision is attached as Appendix A. On November 18, 2008, the Supreme Court of Pennsylvania issued an order denying Mr. Hauman's Petition for Allowance of Appeal. A copy of that order is attached as Appendix B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case invokes the rights of Mr. Hauman under the Fourth Amendment. It provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This Petition concerns an appeal of several orders whereby the 39th Judicial District Judge of Pennsylvania John R. Walker denied Mr. Hauman's Motion to Suppress and the 39th District Judge of Pennsylvania Douglas W. Herman convicted Mr.

Hauman of 11 counts of child pornography and later sentenced Mr. Hauman to 11 separate sentences for same. Tr. of Sentencing Proceedings at 62.

Mr. Hauman was arrested on July 7, 2001 by the Pennsylvania State Police in the Pittsburgh area for solicitation to commit involuntary deviate sexual intercourse. Police Criminal Complaint, Affidavit of Probable Cause. The arrest stemmed from essentially an Internet sting operation whereby Mr. Hauman allegedly engaged in explicit sexual communications with a minor via the Internet. Tr. of Proceedings of Non-jury Trial at 16.

Police arranged for Mr. Hauman to meet the alleged minor in the Pittsburg area. At which point, Mr. Hauman appeared and was arrested for the aforementioned crime. *Id.* at 19. As a result of the Pittsburgh arrest, Pennsylvania State Police in Pittsburgh sent a search warrant to Fulton County, PA seeking permission to search Mr. Hauman's Fulton County home. *Id.* at 26.

The search warrant called for the seizure of the following:

> "any and all computer equipment, including computer systems, hard drives, monitors, keyboards, printers, diskettes, compact disks, digital data storage devices, zip drives, Kanguru drives, and any and all other type of data storage devices, including intellectual content held within all of the aforesaid. Also any types of printed child pornographic materials and *any and all other fruit of this or any other crime.*" Search Warrant (emphasis added).

Trooper Sean Flaherty of the Pennsylvania State Police executed the warrant on July 7, 2001 at Mr. Hauman's Fulton County home where no computer equipment whatsoever was discovered. Tr. of Proceedings of Non-jury Trial at 64. However, the Trooper found 27 computer-generated images underneath Mr Hauman's bathroom, wall-to-wall carpet, which had been professionally tacked down. *Id.* at 62. As a result, Mr. Hauman was charged with 27 counts of sexual abuse of children/possession of child pornography.

Mr. Hauman filed a Motion to Suppress all seized evidence against him in Fulton County. The motion was denied via Order from Judge John Walker on April 19, 2002. Mr. Hauman also made five requests to continue his Fulton County case, pending disposition of the Allegheny case; four of said requests were granted.

At a bench trial on October 2, 2003 Mr. Hauman was convicted of 11 counts of possession of child pornography by Judge Douglas W. Herman. He was sentenced on March 15, 2004 (an Order which was later corrected on May 19, 2004) to serve a total of 7 ½ years at a state correctional institution, followed by 10 ½ years probation.

Mr. Hauman filed a timely notice of appeal on March 25, 2004. He later filed a Concise Statement of Matters Complained of on Appeal. Mr. Hauman's Allegheny County case was dismissed on May 27, 2004 by the Honorable Judge Lester G. Nauhaus.

On September 21, 2006 the Superior Court of Pennsylvania issued an opinion affirming the denial of the Motion to Suppress and Mr. Hauman's conviction.

Mr. Hauman timely filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. On November 18, 2008 that court denied his Petition. This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE PURPOSE OF THE FOURTH AMENDMENT WAS THWARTED BY MR. HAUMAN'S WARRANT WHICH PERMITTED THE PENNSYLVANIA POLICE TO SEARCH MR. HAUMAN'S HOME WITH UNBRIDLED DISCRETION FOR EVIDENCE OF "ANY AND ALL CRIMES" AND BECAUSE THE SUPREME COURT SHOULD RESOLVE THE AMBIGUITY REGARDING THE MEANING OF THE "GREATER PART OF THE WARRANT" TEST.

A. Introduction

Mr. Hauman respectfully requests that this Court grant his Petition for Writ of Certiorari for two main reasons. First, the purpose of the Fourth Amendment was thwarted and Mr. Hauman's rights were violated. Second, there is ambiguity among the Circuits regarding the criteria necessary to be met in order for a court to grant severance for a warrant that contains invalid portions.

Mr. Hauman's Fourth Amendment rights were violated because the Pennsylvania police conducted a search on the basis of a warrant so facially deficient that its overbroad portions contaminated the entire warrant. Although quantitatively the invalid portion is not substantial, qualitatively the invalid portions

authorized an exploratory rummaging in Mr. Hauman's belongings that defeat the purposes of the Fourth Amendment and the exclusionary rule. As such, this court should grant certiorari in order to safeguard the purpose behind the Fourth Amendment and Mr. Hauman's rights.

Furthermore, there exists ambiguity among the Circuits regarding the criteria necessary to be established for a court to deny severance. Some Circuits appear to only consider qualitative factors. Others consider qualitative ones as well.

For these reasons, Mr. Hauman respectfully requests that this Court grant a writ of certiorari.

B. Mr. Hauman's Warrant Was Unconstitutionally Overbroad Because it Failed the Particularity Requirement of the Fourth Amendment.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and guarantees that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*" Fourth Amend. (emphasis added). As such it protects persons, like Mr. Hauman, from searches which are the products of warrants which are so facially deficient that they fail to particularize things that may be seized. *United States v. Leon*, 468 U.S. 897, 923 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 988-91 (1984).

Clearly, the language in Mr. Hauman's warrant authorizing the Pennsylvania police to obtain "evidence

of any and all fruit of this or any other crime" fails to meet the particularity requirement of the Fourth Amendment. *See United States v. Leon*, 468 U.S. 897, 923 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 988-91 (1984). For instance, Circuits when hearing cases involving warrants with similar, or even less expansive, language have found that these warrants are unconstitutional. *United States v. Clark*, 31 F.3d 831, 836 (9th Cir. 1994) (finding that a warrant calling for the seizure of "fruits and instrumentalities of [a] violation of Title 21, U.S.C. § 841(a)(1)" was facially deficient); *United States v. Morris*, 977 F.2d 677, 682 (1st Cir. 1992) (finding that the "catch-all phrase authorizing seizure of 'any other object in violation of the law' is impermissibly broad").

C. Mr. Hauman's Motion to Suppress Should have been Granted by the Trial Court Because the Pennsylvania Police Could not have Reasonably Relied on its Language and Because the Invalid Portion of the Warrant is not Severable.

While overbreadth probably may not be the sole basis for the suppression of evidence, Mr. Hauman's Motion to Suppress should have been granted and his conviction reversed because the Pennsylvania police unreasonably relied on the warrant and the warrant is so facially deficient that it cannot be redacted.

This Court has found that the accused must show that law enforcement officers, like the police in Mr. Hauman's case, unreasonably relied on an invalid warrant in order for suppression to be a viable remedy. *Leon*, 468 U.S. at 922. Clearly, the warrant in the instant case is not one on which the Pennsylvania police

could have reasonably relied since it contains broader language than those warrants in cases in which the courts have found that reliance was not reasonable. *See, e.g., Clark*, 31 F.3d at 836.

Furthermore, although it appears that all Circuits which have addressed the issue of severance have adopted the doctrine,[1] Mr. Hauman's Motion to Suppress should have been granted and his conviction reversed because his warrant fails to meet the criteria necessary to be established for severance. *See*, e.g., *United States v. Naugle*, 997 F.3d 819, 822 (10th Cir. 1993). Under the doctrine of severability, a court may redact a warrant with invalid portions and only admit materials seized under the authority of the valid portions. *United States v. Sells*, 463 F.3d 1148, 1155 (10th Cir. 2006). Two criteria must be met, however. The valid portions must be distinguishable from the invalid and the valid portions must make up a greater part of the warrant. *Naugle*, 997 F.2d at 822; *see also Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (finding that total suppression may still be required even if part of a warrant is valid if the invalid portion

[1] The Third Circuit used the term 'redaction' in United States v. Christine, 687 F.2d 749 (3d Cir. 1982). Other courts have used 'severance,' 'partial suppression,' or 'severability'. *See* United States v. Cook, 657 F.2d 730 (5th Cir. Unit A 1984); United States v. Fitzgerald, 724 F.2d 633 (8th Cir.), *cert. denied*, 466 U.S. 950 (1983); Sovereign News Co. v. United States, 690 F.2d 569, 576 (6th Cir.), *cert. denied*, 464 U.S. 814 (1982); United States v. Riggs, 690 F.2d 298, 300 n.5 (1st Cir. 1982); United States v. Christine, 687 F.2d 749, 754 (3d Cir. 1982); F.2d 298, 300 n.5 (1st Cir. 1982); 942, 952 (5th Cir. 1982); United States v. Cardwell, 680 F.2d 75 (9th Cir. 1982); United States v. Torch, 609 F.2d 1088 (4th Cir.), *cert. denied*, 446 U.S. 957 (1979); Huffman v. United States, 470 F.2d 386 (D.C. Cir. 1971), *rev'd on reh'g on other grounds*, 502 F.2d 419 (D.C. Cir. 1974).

predominates authorizing "a general, exploratory rummaging in a person's belongings").

The warrant in Mr. Hauman's case fails to satisfy the second criteria. *See Sells*, 463 F.3d at 1158-1161. Under the "greater part of the warrant" test, a court should employ not only a quantitative evaluation of a warrant but also a qualitative one. *Sells*, 463 F.3d at 1159-60; *see also Illinois v. Gates*, 462 U.S. 213, 236 (1983) (indicating that merely counting parts is a "hypertechnical" interpretation). That is, even though the invalid portion in Mr. Hauman's warrant is arguably smaller than the valid portion, the invalid portion is still the greater part of the warrant because it is so extensive that it contaminates the whole warrant. *See Sells*, 463 F.3d at 1160. It does not merely authorize the search and seizure of evidence of one related articulated crime, like the warrant in *Clark*, 31 F.3d at 836. The warrant authorizes the seizure of "evidence of *any and all* fruit of . . . *any* other crime." Thus, the invalid portion of Mr. Hauman's warrant is not severable because it contaminated the whole warrant by granting the Pennsylvania police unlimited discretion to search his entire home for any crime.

D. Certiorari Should Also be Granted to Resolve Ambiguity Among the Federal Circuits Regarding the Means of Determining when Severance is Appropriate.

Although there does not appear to be a fully developed split among the Circuits, there remains ambiguity regarding the conditions under which the invalid portions of a warrant should be severed from

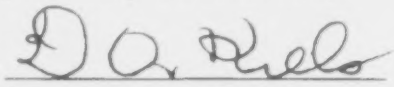
the valid portions. The Tenth Circuit has clearly found that quantitative and qualitative factors must be considered. *Sells*, 463 F.3d at 1159-60. Other circuits appear to have only considered quantitative factors. E.g., *United States v. Gomez-Soto*, 723 F.2d 649, 654 (9th Cir. 1984). For this reason, this Court should grant Mr. Hauman's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Mr. Hauman respectfully prays that a writ of certiorari be granted.

DATED: February 17, 2009

Respectfully submitted,

By: 

Stephen D. Kulla
Attorney for Petitioner
Darin Hauman

STEPHEN D. KULLA
KULLA, BARKDOLL, ULLMAN & PAINTER P.C.
9 EAST MAIN STREET
Waynesboro, PA 17268
(717) 762-3374
Attorney for Petitioner

J. S26010/06

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

DARIN L. HAUMAN,

Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1444 MDA 2005

Appeal from the Judgment of Sentence entered on August 23, 2005, in the Court of Common Pleas of Fulton County, Criminal Division, at No(s) 115 of 2001

BEFORE: LALLY-GREEN, PANELLA, JJ., and McEWEN, P.J.E.

MEMORANDUM: FILED: September 1, 2006

Appellant, Darin L. Hauman, appeals from the judgment of sentence entered on August 23, 2005. In connection with this appeal, Appellant's counsel has filed a Petition for Remand. We affirm the judgment of sentence. We also deny the Petition for Remand, without prejudice to Appellant's ability to pursue any ineffectiveness claims under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546.

This case is procedurally complex. The trial court set forth the early factual and procedural history of the case as follows:

Darin Hauman (the defendant), is charged

in Fulton County, with twenty-seven (27) counts of sexual abuse of children. The charges arose out of a sting operation conducted by Trooper John LaRoache of the Pennsylvania State Police (PSP) in Allegheny County. Trooper LaRoache is assigned to investigate computer and internet crimes.

Upon receipt of a tip, Trooper LaRoache, posing as a twelve (12) year-old female, "Missy Little", began conversing in an on-line chat room. As "Missy Little", he received communications from "Jake Thomas", who suggested that he would like to meet "Missy Little", photograph her, have sex with her and possibly put her in a pornographic movie.

Trooper LaRoache, communicating as the minor female, arranged a meeting with "Jake Thomas" in the Pittsburgh area. Darin L. Hauman, of Thompson Township in Fulton County, is the person who showed up for that meeting. After his arrest, the defendant admitted that he communicated with "Missy Little" as "Jake Thomas", and that he intended to have intercourse with the girl. Ultimately the defendant was charged, in Allegheny County, with Attempted Statutory Sexual Assault, 18 Pa.C.S. § 3122.2, and Unlawful Contact or Communication with a Minor, 18 Pa.C.S. § 6318.

Trooper LaRoache provided information for a search warrant of defendant's home to Pennsylvania State Police Trooper Sean Flaherty, in Fulton County. Trooper Flaherty completed the Affidavit of Probable Cause and Application for Search Warrant which was

approved and issued by District Justice Wendy Mellott.

The warrant identified the following items to be searched for and seized:

> [a]ny and all computer equipment, including computer systems, hard drives, monitors, keyboards, printers, diskettes, compact discs, digital data storage devices, zip drives, kanguru drives, and any and all other type of data storage devices, including the intellectual content held within all of the aforesaid. Also any type of printed child pornographic materials and any and all other fruit of this or any other crime.

(Application for Search Warrant and Authorization, Warrant Control Number: 010707A.)

Upon execution of the search warrant, Trooper Flaherty discovered twenty-seven (27) computer generated images of children which were hidden under the bathroom rug. Many of the children appear to be under the age of eighteen years and the images depict them in various sexually explicit poses and activities. No computer equipment or computer storage devices were found in the search. As a consequence of the discovery, the Fulton County District Attorney charged the defendant with 27 counts of sexual abuse of children. 18 Pa.C.S.A. § 6312[(d)(1)].

The defendant filed an omnibus motion to suppress the evidence found during execution of the search warrant.

Suppression Court Opinion, 4/19/2002, at 1-2. The suppression court denied Appellant's motion to suppress.

The child-pornography case proceeded in Fulton County. Appellant petitioned the Fulton County court several times to postpone the trial pending the outcome of the Allegheny County attempted-statutory-assault case. The Fulton County court granted several of these continuances, but ultimately the court proceeded with a bench trial on October 2, 2003. After reviewing all 27 photographs, the trial court found Appellant guilty of 11 counts, and not guilty of 16 counts. N.T., 10/2/2003, at 109-113.

On March 15, 2004, following a hearing, the trial court determined that Appellant was a sexually violent predator under Megan's Law, 42 Pa.C.S.A. § 9791 *et seq.* On the same date, the trial court sentenced Appellant to an aggregate prison term of seven and one-half to 17 years, followed by an aggregate probation term of 10½ years.

Appellant filed a notice of appeal on March 23, 2004. Appellant did not file post-sentence motions. On April 16, 2004, Appellant's counsel sent a letter to the trial court, pointing out several technical errors in the court's sentencing scheme which may have rendered the sentence illegal. On May 19, 2004, in response to counsel's letter, the trial court amended the sentence: (1) to clarify that the sentences on all counts were to run consecutive with each other; and (2) to correct the maximum prison term on counts 3 and 4, to comply with the rule that the minimum term cannot exceed one-half the maximum.[1] Despite this corrective order,

[1] On counts 3 and 4, the trial court had originally imposed a sentence of 21 to 36 months. The court corrected the maximum term to be 42 months.

the aggregate sentence remained the same.

During this time, the case was pending on direct appeal. Appellant raised five issues on appeal.[2] On March 18, 2005, this Court remanded for resentencing, because the minimum term on counts 3 and 4 exceeded one-half the maximum. This Court remanded for correction of the illegal sentence without addressing any of the substantive issues that Appellant raised on appeal. We wrote: "the balance of Hauman's issues, of course, are preserved in the event Hauman files a direct appeal following resentencing." Superior Court Memorandum at 3-4.

Appellant and the Commonwealth filed a joint motion for reargument/reconsideration with this Court, arguing that the trial court had already corrected the illegal sentence on May 19, 2004. ***See*** Trial Court Opinion, 10/24/2005, at 2. This Court denied the motion for reconsideration on May 25, 2005.

The case proceeded to a resentencing hearing on August 23, 2005.[3] During the hearing, the court revisited its prior Megan's Law findings, and re-evaluated the sentence in light of Appellant's "track record" during the time he had already spent in

---

[2] Appellant raised the following issues in the first appeal: (1) whether the sentences should merge; (2) whether the search warrant leading to the discovery of the contraband was overbroad; (3) whether Appellant had a reasonable expectation of privacy in the area where the pornographic material was found; (4) whether the instant Fulton County proceedings should have been stayed until a related Allegheny County matter was concluded; and (5) whether the statute banning possession of child pornography is unconstitutional. These issues are essentially identical to the issues he now raises in the instant appeal.

[3] The cover page of the resentencing hearing erroneously lists the date as "December 17, 2004."

prison. Despite taking new evidence and hearing new arguments, the court imposed the same sentence that it had imposed in the corrected order dated May 19, 2004.

Again, Attorney Barkdoll did not file post-sentence motions. On August 29, 2005, counsel filed a notice of appeal from the new sentence. Shortly thereafter, and within 10 days of resentencing, Appellant filed timely *pro se* post-sentence motions. Appellant argued, *inter alia*, that: (1) the trial court erred and relied on inaccurate information when it labeled him a sexually violent predator; (2) the sentence was excessive; (3) a special condition of sentencing (that Appellant have no unsupervised contact with minors) deprived him of due process; and (4) the court erred by imposing fines and costs, given his indigent status. The trial court declined to act on these motions because the case was again pending on appeal to this Court.

On November 28, 2005, Appellant filed with this Court a *pro se* Motion for Change of Appointed Counsel. Appellant argued that after resentencing, he wanted counsel to file post-sentence motions, because Appellant feared that "there were significant issues that would likely become waived if not addressed properly." Motion ¶ 4. According to Appellant, counsel ignored Appellant's request to file post-sentence motions. ***See id***. ¶¶ 4-5. Appellant further argued that counsel was ineffective for failing to preserve these issues, and that he and his counsel are fundamentally at odds about how to litigate this case. Appellant sought a "stay" of this appeal, and a remand for appointment of new counsel to assist Appellant with litigation of his *pro se* post-sentence motions. On January 13, 2006, this Court denied Appellant's motion in a *per curiam* order.

On February 17, 2006, counsel filed a brief on

Appellant's behalf. Counsel then filed a Petition for Remand on February 21, 2006. In the Petition, counsel argued that this Court should remand for a determination of whether Appellant's desire for new counsel is knowing, intelligent, and voluntary. Counsel also argued that in his view, appointment of new counsel is not necessary because: (1) counsel saw "no meritorious reason to file a post-sentence motion," especially in light of the fact that the court's new sentence was essentially identical to the original sentence; and (2) "each issue which Hauman wishes to raise within a post sentence motion has been already properly preserved, and in fact raised pursuant to the instant appeal to the Superior Court." Petition for Remand ¶¶ 4-5,[4]

---

[4] We are constrained to conclude that the record does not support counsel's position. Appellant clearly wishes to raise claims related to the discretionary aspects of his sentence and his Megan's Law assessment. Appellant is correct that these issues will indeed be waived if they were not raised in the trial court, either at the sentencing/Megan's Law hearings, or in post-sentence motions. ***See*** Pa.R.A.P. 302(a) (issues not raised for the first time in the trial court are waived and cannot be raised for the first time on appeal); ***Commonwealth v. Dodge***, 859 A.2d 771 (Pa. Super. 2004) (issues relating to the discretionary aspects of the sentence are waived if they are not raised at sentencing or in post-sentence motions), *appeal denied*, 880 A.2d 1236 (Pa. 2005); ***but see Commonwealth v. Evans***, 2006 PA Super 132 (appellate challenge to the sufficiency of the evidence for an SVP determination is treated like a challenge to the sufficiency of the evidence for the underlying crime, and apparently need not be raised in a post-sentence motion). Indeed, waiver of these issues is essentially guaranteed by the fact that counsel did not raise them in his appellate brief. ***See Commonwealth v. Berry***, 877 A.2d 479 (Pa. Super. 2005) (*en banc*) (issues not relating to the legality of the sentence are waived if they are not properly raised and preserved; this Court may not address waived claims *sua sponte*). Indeed, we are somewhat perplexed by counsel's seemingly

We will begin by addressing Appellant's *pro se* motion for change of appointed counsel,[5] and counsel's Petition for Remand. Essentially, these motions arose because Appellant is arguing that Attorney Barkdoll was ineffective for failing to raise and/or preserve various issues.

In ***Commonwealth v. Grant***, 813 A.2d 726 (Pa. 2002), our Supreme Court announced a general rule that claims of ineffectiveness should be deferred from the direct appeal process to the PCRA. Our Supreme Court has announced only one exception to that rule: namely, cases where the trial court has held an evidentiary hearing on the ineffectiveness claim, and has issued an opinion thereon. ***Commonwealth v. O'Berg***, 880 A.2d 597, 602 (Pa. 2005), *citing* ***Commonwealth v. Bomar***, 826 A.2d 831 (Pa. 2003). In ***O'Berg***, our Supreme Court specifically disapproved of any attempts by this Court to create its own exceptions to ***Grant***. ***Id***. In light of this Supreme Court authority, the most appropriate response is to deny counsel's Petition for Remand, and defer Appellant's ineffectiveness claims to the PCRA. At that time, Appellant will be entitled to new counsel to assist him with his claims of ineffectiveness against Attorney Barkdoll.[6]

---

steadfast refusal to acknowledge or litigate Appellant's claims relating to the discretionary aspects of sentence and his Megan's Law assessment. This is not a case where counsel acknowledges those claims, and yet argues that they are frivolous.

[5] As noted above, this Court denied that *pro se* petition in January 2006.

[6] This Court's recent decision in ***Commonwealth v. Battle***, 879 A.2d 266 (Pa. Super. 2005), does not compel a different result. ***Battle*** involved a situation where a PCRA appellant sought a remand for new appointed counsel to pursue his PCRA appeal. This Court set forth an extensive procedure which involves;

We now proceed to the merits. Appellant raises the following issues on appeal:

1. Should the 11 convictions against Darin Hauman merge for sentencing purposes, where the crime in question proscribes "possession" as the illegal act and where Hauman in fact possessed a singular set of computer generated images?

2. Is a search warrant illegal when the operative language of the warrant, which led to the seizure of the images in question,

---

(1) the defendant's petition for a remand, (2) current counsel's response thereto, and (3) this Court's independent review. We reasoned that "to require a remand for new appointed counsel every time that a *pro se* Appellant made an allegation of ineffective assistance would create unreasonable administrative burdens and delays. However, the court abdicates its responsibility if it does not provide some mechanism for judicial review of *pro se* claims of ineffective assistance of counsel." ***Id.*** at 269; ***see also Commonwealth v. Gallman***, 838 A.2d 768 (Pa. Super. 2003), *appeal denied*, 848 A.2d 928 (Pa. 2004). Such concerns are not present in the instant case, because this is a direct appeal. As ***Grant*** makes clear, Appellant has the PCRA process available to him after this direct appeal is complete. Without commenting on the continued viability of ***Battle*** in the PCRA scenario, we simply decline to adopt it in the direct appeal scenario.

We also note that this is not a case where Appellant is seeking to proceed *pro se* on appeal. That scenario implicates a defendant's independent right (whether rooted in the federal constitution or otherwise) to conduct his appeal **without** the assistance of counsel. For a discussion of whether such a right exists and the procedures for handling such a claim, ***see Martinez v. Court of Appeal***, 526 U.S. 152 (2000); ***Commonwealth v. Grazier***, 713 A.2d 81 (Pa. 1998); and ***Commonwealth v. Rogers***, 645 A.2d 223 (Pa. 1994). Finally, this is not a case where Appellant is seeking to "overburden and confuse" the courts by filing *pro se* briefs in **parallel** with counsel's brief. ***See Commonwealth V. Pursell***, 724 A.2.d 293 (Pa. 1999), cert. denied, 528 U.S. 975 (1999).

called for the seizure of evidence from "any and all fruit of this or any other crime"? In the alternative, should improper language from the warrant be redacted?

3. Did the Appellant have a Constitutional "reasonable expectation of privacy" in items found under his bathroom carpet?

4. Where the Appellant was charged with crimes in Allegheny County, which led to the search warrant resulting in the charges at issue in Fulton County, should the Fulton County court have continued Appellant's case until the Allegheny County matter was disposed of?

5. Is the Pennsylvania statute under which Appellant has been charged and convicted, illegal in light of recent U.S. Supreme Court decisions, and where the Commonwealth never demonstrated that the "victims" in question were real individuals?

Appellant's Brief at 6.

First, Appellant argues that the 11 counts of sexual abuse of children should have merged for sentencing purposes. Specifically, Appellant argues that he only committed one criminal act because: (1) the statute criminalizes possession of child pornography; and (2) Appellant "possessed" one group of images, found in one place at one time.

This Court recently summarized the principles of merger as follows:

> A claim that the trial court imposed an illegal sentence by failing to merge sentences is

a question of law. Accordingly, our standard of review is plenary.

In ***Commonwealth v. Gatling***, 807 A.2d 890 (Pa. 2002) (plurality), our Supreme Court clarified the appropriate analysis for determining when convictions should merge for the purposes of sentencing:

> **The preliminary consideration is whether the facts on which both offenses are charged constitute one solitary criminal act. If the offenses stem from two different criminal acts, merger analysis is not required.** If, however, the event constitutes a single criminal act, a court must then determine whether or not the two convictions should merge. In order for two convictions to merge: (1) the crimes must be greater and lesser-included offenses; and (2) the crimes charged must be based on the same facts. If the crimes are greater and lesser-included offenses and are based on the same facts, the court should merge the convictions for sentencing; if either prong is not met, however, merger is inappropriate.

Commonwealth v. Johnson, 874 A.2d 66, 70 (Pa. Super. 2005) (citation omitted) (emphasis added), *appeal denied*, 899 A.2d 1122 (Pa. 2006).

The Crimes Code defines sexual abuse of children in relevant part as follows:

> **§ 6312. Sexual abuse of children**
>
> **(d) Possession of child pornography. –**
>
> (1) any person who knowingly possesses or controls any book, magazine, pamphlet, slide,

> photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense.

18 Pa.C.S.A. § 6312(d)(1).

In ***Commonwealth v. Davidson***, 860 A.2d 575 (Pa. Super. 2004), this Court held that merger is inappropriate where a person possesses pornographic images of different children, and/or distinct pornographic images of the same child. We reasoned that "each photograph of each child victimized that child and subjected him or her to precisely the type of harm the statute seeks to prevent." ***Id***. at 583. In other words, possession of each unique image constitutes a separate criminal offense. ***Id***. Moreover, any different conclusion would give criminals a "volume discount on crime" merely by storing all of the images in the same place. ***Id***.

The record reflects that Appellant's 11 convictions were based on possession of 11 different and unique pornographic images. Thus, ***Davidson*** controls the outcome of this case.[7] Appellant's first claim fails.

---

[7] We recognize that on March 15, 2005, our Supreme Court granted Davidson's petition for allowance of appeal in order to address this very question. ***Commonwealth v. Davidson***, 871 A.2d 185 (Pa. 2005). We note, however, that this Court's decision is binding until and unless our Supreme Court reverses it. ***Commonwealth v. Pepe***, 897 A.2d 463 (Pa. Super. 2006). To date, our Supreme Court has not issued a decision.

We must express some measure of concern about counsel's failure to cite ***Davidson***. Counsel's brief, filed in February 2006, states that "research would suggest that the only Pennsylvania case having addressed such a question regarding this **specific** offense is ***Commonwealth v. Kitchen***, 814 A.2d 209 [(Pa. Super.

Next, Appellant argues that the evidence against him should have been suppressed. Specifically, Appellant argues that the search warrant was overbroad because it authorized the seizure of "any and all other fruit of this or any other crime."

In ***Commonwealth v. McEnany***, 667 A.2d 1143, 1148 n.3 (Pa. Super. 1995), *appeal denied*, 675 A.2d 1245 (Pa. 1996), this Court noted that "the use of the phrase 'any other contraband or evidence related to this crime' turns a search warrant into a general investigatory tool in violation of the Fourth Amendment to the United States Constitution and Article 1 § 8 of the Pennsylvania Constitution." On the other hand, the warrant will not be deemed overbroad if it **also** describes, with the requisite particularity, the items to be seized. ***See Commonwealth v. Rivera***, 816 A.2d 282, 292 (Pa. Super. 2003), *appeal denied*, 828 A.2d 350 (Pa. 2003). The key inquiry is whether probable cause existed for those items that were specifically described in the warrant. ***Id.***

In the instant case, the warrant did include overbroad language of the sort prohibited in ***McEnany***. On the other hand, the warrant **also** specifically authorized the seizure of "any type of printed child pornographic materials." This is precisely what the police found in executing the warrant. Thus, we must

2002)]." Appellant's Brief at 10 (emphasis in original). ***Davidson***, which is directly on point, was issued in October 2004. We also note that the trial court cited ***Davidson*** in its Rule 1925 opinion dated October 4, 2005. Thus, it would appear that counsel either did not read the trial court's opinion, or chose to ignore it. We stress that appellate counsel has a responsibility to his client and to this Court to meaningfully address the trial court's Rule 1925 opinion. It is suggested that counsel not simply repeat whatever arguments he made in the trial court, and act as if the trial court did not rule on the issue.

determine whether probable cause existed to support a search for printed child pornography. ***Rivera***.

Indeed, this is Appellant's next sub-issue on appeal. Appellant suggests that the police lacked probable cause to believe that they would find printed pornographic materials in a search of Appellant's home. Appellant's Brief at 17. The legal standards relevant to this claim are well settled:

> Before an issuing authority may issue a constitutionally valid search warrant, he or she must be furnished with information sufficient to persuade a reasonable person that probable cause exists to conduct a search. (citations omitted) The information offered to demonstrate probable cause must be viewed in a common sense, nontechnical, ungrudging and positive manner. (citations omitted) It must also be remembered that probable cause is based on a finding of the probability, not a *prima facie* showing of criminal activity, and that deference is to be accorded a magistrate's finding of probable cause. (citations omitted)
>
> Hearsay information is sufficient to form the basis of a warrant so long as the magistrate has been provided with sufficient information to make a "neutral" and "detached" decision about whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding that probable cause existed."
>
> ***Commonwealth v. Baker***, 532 Pa. 121, 615 A.2d 23, 25 (Pa. 1992) (quoting ***Commonwealth***

v. Gray, 509 Pa. 476, 503 A.2d 921 (Pa. 1985)), citing *Illinois v. Gates*, 462 U.S. 213, 236, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 547 (1983).

Rivera, 816 A.2d at 291.

The suppression court reasoned as follows:

> The court disagrees with the defendant's assertion that the four corners of the warrant do not provide sufficient evidence to suggest probable cause to believe that the items sought would be found in the home of the defendant and that the warrant did not supply underlying circumstances upon which the police based their conclusion that the items sought were located in the defendant's home.
>
> The affidavit of probable cause established the following facts[:] the defendant was arrested while attempting to meet a person he thought was [a] minor female for the admitted purpose of having intercourse; he admitted sending her numerous email communications with a sexual content including suggestions that he would like to photograph her; he had prior convictions for indecent assault and attempted statutory rape requiring him to register as a Megan's Law offender; and, the investigating officers were experienced in the area of computer crime and averred that it was common for people who committed these types of crimes to collect images of child pornography. Consequently, the officers sought to search for and seize: computer equipment to retrieve evidence of the defendant's communications with "Missy Little," and evidence of child pornography.

> Common sense informs this court that the known facts about the defendant's actions and history, combined with the experience of the investigators with regard to this particular type of crime, would lead a reasonable person to believe that there was a substantial basis for probable cause to issue a search warrant for computer equipment and child pornography in the defendant's home.
>
> It is reasonable to believe that the defendant communicated from a computer in his own home; that is the setting which would minimize his risk of observation. The hindsight knowledge that no computer equipment was found upon execution of the warrant does not diminish the reasonableness of this belief when it was made.
>
> The investigator's experience regarding frequent possession of child pornography by people who use the internet to prey on children for sex and the fact that the defendant was arrested trying to do exactly that, combined with the defendant's admitted communications suggesting he photograph and/or videotape "Missy Little" provided substantial probable cause for District Justice Mellott to make a practical, common-sense decision that there was a fair probability that child pornography would be found in the defendant's home, as allowed under ***Gates***, *supra*.

Suppression Court Opinion 5/7/2002, at 4-5. We concur with this assessment, and hereby adopt it. This claim fails.[8]

---

[8] As an alternative argument, Appellant contends that the "improper language" of the warrant should be redacted. Appellant

In the same section of his brief, Appellant argues that the warrant was overbroad because it left the officers with too much discretion to decide what is pornography and what is not.

The definition of child pornography is clearly and specifically set forth in the Crimes Code. Section 6312(d)(1) defines child pornography as any "material depicting a child under the age of 18 engaging in a prohibited sexual act or in the simulation of such act." Section 6312(a) defines "prohibited sexual act" as "sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity as depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." In ***Davidson***, this Court held that the Crimes Code defines child pornography in a manner that is not vague or overbroad. We held that "[t]here is nothing vague about that definition. It permits ordinary people to understand what conduct is prohibited." ***Davidson***, 860 A.2d at 583.

The record reflects that the language of the warrant authorizes seizure of "child pornography," not merely any nude images of children. Thus, it follows that the warrant, which uses the same operative language as

---

contends that the "improper language" was: "any type of printed child pornographic materials and any and all other fruit of this or any other crime." Appellant's Brief at 18. Appellant argues that if the phrase "any type of printed child pornographic materials" is redacted from the warrant, then the evidence against him would be suppressed. We disagree with the premise of this argument. As noted above, the section of the warrant authorizing seizure of "any type of printed child pornographic materials" was not improper. Thus, Appellant is not entitled to relief.

the Crimes Code, did not leave to the police unfettered or overbroad discretion. Appellant's claim fails.

Next, Appellant argues that he had a reasonable expectation of privacy in the tacked-down area of his bathroom carpet where the items were found. While we agree with this assertion, it is immaterial. The mere fact that a person has a reasonable expectation of privacy in an area does not mean that the area cannot be searched. Indeed, that area can be searched, so long as the search complies with Pennsylvania search and seizure law, which grants a greater degree of privacy protection than the Fourth Amendment to the United States Constitution. ***See generally Commonwealth v. Millner***, 888 A.2d 680 (Pa. 2005); ***Commonwealth v. Beaman***, 880 A.2d 578 (Pa. 2005). As noted above, the seizure of the items from Appellant's home was permissible. This claim fails.

Next, Appellant argues that the trial court should have continued the Fulton County child-pornography case until the resolution of the Allegheny County attempted-statutory-rape case.

> The grant or denial of a motion for a continuance is within the sound discretion of the trial court and will be reversed only upon a showing of an abuse of discretion. As we have consistently stated, an abuse of discretion is not merely an error of judgment. Rather, discretion is abused when the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record[.]

Commonwealth v. Randolph, 873 A.2d 1277, 1281 (Pa. 2005) (citations omitted), *cert. denied*, 126 S.Ct. 1659 (2006). Moreover, we note that arguments that are unsupported by citation to pertinent legal authority are waived. ***Commonwealth v. Murchinson***, 899 A.2d 1159 (Pa. Super. 2006).

Again, Appellant argues that the Fulton County court should have waited for the result of the Allegheny County action. Specifically, Appellant contends that because the Allegheny County action was ultimately dismissed, that fact "should essentially 'spill over' into the Fulton County matter and be automatic grounds for dismissal." Appellant's Brief at 23. This bare assertion lacks any legal support. Because Appellant has failed to demonstrate an abuse of discretion in the court's denial of a further continuance, he is not entitled to relief.

Finally, Appellant argues that section 6312 is unconstitutionally vague and overbroad in light of ***Ashcroft v. Free Speech Coalition***, 535 U.S. 234 (2002). Appellant contends that the statute is overbroad because it could prohibit possession of images that do not depict real children. Appellant also suggests that his convictions are unsupportable because the Commonwealth failed to identify the identities of the victims. In ***Davidson***, this Court extensively discussed and rejected these challenges.[9] We also note that, like in ***Davidson***, the Commonwealth presented proof that the images found in Appellant's home **were** of real children, and were not mere "virtual" or computer-

[9] We note that our Supreme Court is reviewing ***Davidson's*** holding on this point. Again, until and unless ***Davidson*** is overruled, it controls. ***Pepe***.

generated images.[10] Because ***Davidson*** is controlling, Appellant is not entitled to relief.

Judgment of sentence affirmed. Petition for Remand denied. Jurisdiction relinquished.

Judgment Entered:

James D. McCullough
Deputy Prothonotary

Date: September 1, 2006

[10] Appellant suggests in passing that the Commonwealth presented inadequate expert testimony that the images were of real children. This argument is so vague and undeveloped as to render it waived. ***Murchinson***.

No. 115 of 2001-CR

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	No. 832 MAL 2006
Respondent	Petition for Allowance of Appeal from the Order of the Superior Court
v.	
DARIN L. HAUMAN,	
Petitioner	

FULTON COUNTY
PENNSYLVANIA
FILED
10:26 am
DEC 09 2008
PROTHONOTARY
CLERK OF COURTS
REGISTER OF WILLS RECORDER OF DEEDS

ORDER

PER CURIAM

AND NOW, this 18th day of November 2008, the Petition for Allowance of Appeal is DENIED.

TRUE & CORRECT COPY

ATTEST: November 18, 2008

Elaine S. Hellen

Elaine S. Hellen, Assistant, Chief Clerk

APPENDIX B